MOTION FILED

FEB 16 2010

No. 09-861

In the Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, et al.,
Petitioners,

v.

KURT S. BROWNING, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, THE RUTHERFORD INSTITUTE, NATIONAL VOTER OUTREACH, INC., THE INITIATIVE AND REFERENDUM INSTITUTE, CITIZENS IN CHARGE FOUNDATION, AND THE BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF MARION B. BRECHNER FIRST AMENDMENT PROJECT, THE RUTHERFORD INSTITUTE, NATIONAL VOTER OUTREACH, INC., THE INITIATIVE AND REFERENDUM INSTITUTE, CITIZENS IN CHARGE FOUNDATION, AND BRECHNER CENTER FOR FREEDOM OF INFORMATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Movants the Marion B. Brechner First Amendment Project, The Rutherford Institute, National Voter Outreach, Inc., The Initiative and Referendum Institute, Citizens in Charge Foundation, and the Brechner Center for Freedom of Information (the "Movants") hereby request leave to file the accompanying *amici curiae* brief in this case. The proposed brief will be submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Petitioners Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People have consented to the filing of this brief. Respondents Kurt S. Browning and Sharon L. Harrington, in their respective official capacities as Secretary of State of the State of Florida and Supervisor of Elections of Lee County, have not consented.

INTERESTS OF THE AMICI CURIAE

As set forth in the accompanying brief, Movants are non-profit, non-partisan organizations committed to protecting civil liberties, including the First Amendment freedoms of speech and petition that are central to the above-captioned case, and non-partisan organizations dedicated to petition solicitation and direct democracy.

ISSUES ADDRESSED BY MOVANTS IN BRIEF

At the heart of this case is a Florida statute that restricts political expression based upon its content. The Eleventh Circuit ruled that the statute was constitutional as applied to Petitioners' speech directed to voters after they exited the polls. In their proposed brief, Movants address two reasons why this Court should grant the Petition for Writ of Certiorari. First, the Eleventh Circuit's Opinion creates substantial uncertainty and conflict about the evidentiary burden the State must meet to ban political speech. Indeed, the Opinion establishes a lower evidentiary burden for banning political speech than the burden the State must meet in cases involving lesser levels of constitutional scrutiny, such as cases concerning adult entertainment zoning ordinances. This illogical disparity should be addressed by the Court.

Second, the brief addresses the conflicting decisional law governing the constitutionality of statutes that distinguish between similarly situated speakers, and the substantial need for this Court to clarify the law.

ASSISTANCE TO BE RENDERED TO THE COURT BY MOVANTS

Movants' proposed brief will assist this Honorable Court by providing a First Amendment-based perspective on the impact of the Eleventh Circuit's Opinion that is different from – and broader than – Petitioners' perspective. The proposed brief also will analyze issues not fully addressed in the Petition for Writ of Certiorari. For example, the brief will consider this Court's recent decision in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), a decision rendered after the Petition for Writ of Certiorari was filed and therefore not addressed therein. As the brief argues, *Citizens United* is important to this Court's consideration of the Petition for Writ of Certiorari because it held unconstitutional a statute that – like the Florida statute at issue in this case – distinguishes among similarly situated speakers. Movants' brief will help ensure a full presentation of the issues to this Court.

CONCLUSION

Movants are gravely concerned by the unclear evidentiary standard the State must meet before restricting political speech near polling

places and the broad impact this lack of clarity will have on the ability of citizens to exercise their First Amendment rights of speech, petition, and association. Given the paramount importance of political speech, irrespective of its content, the undersigned Movants respectfully request they be granted leave to file the attached *amici curiae* brief in order to present additional arguments and viewpoints as to why the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

This brief, filed in support of Petitioners, Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People (collectively "Petitioners"), is submitted to the Court with the consent of counsel for Petitioners and without the consent of Respondents who withheld consent. As detailed below, *amici curiae* are committed to protecting civil liberties, including the First Amendment freedoms of speech and petition that are central to this case. Because of the potential impact this litigation could have on First Amendment speech and petition rights throughout the country, *amici* have a strong and direct interest in the outcome of this case.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a non-profit, non-partisan organization located at the University of Florida in Gainesville, Florida. It is

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rules 37.2(a) and 37.2(b), counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief.

dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

The Rutherford Institute ("Rutherford") is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, Rutherford specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

National Voter Outreach, Inc. ("NVO"), a Nevada corporation, is a political consulting firm specializing in organizing the collection of signatures to qualify issues and candidates for ballots nationwide. NVO has conducted successful campaigns in forty-three states, organizing the collection of more than 30 million signatures. NVO has organized a number of drives where collecting signatures at the polls was critical to success. NVO has been conducting signatures drives in Florida since 1984. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

The Initiative and Referendum Institute (the "Institute") is a non-profit, nonpartisan educational institution headquartered at the University of Southern California. The Institute's mission is to provide information to the

public, scholars, policymakers, and journalists about ballot propositions, and to promote the study of direct democracy. The Institute was established in 1998, in recognition of the initiative and referendum process's influence on America. Its interest is to protect and improve democratic processes.

Citizens in Charge Foundation (the "Foundation") is a non-profit, non-partisan organization dedicated to protecting the initiative and referendum rights of citizens across the country through educational programs and, when necessary, by participating in litigation. Founded in 2003, the Foundation believes every citizen should have an open and accessible process for initiating simple statutes and constitutional amendments as well as referring legislative acts to a popular vote. The organization has worked with citizens and legislators nationwide and taken part in numerous state and federal court cases.

The Brechner Center for Freedom of Information (the "Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance.

SUMMARY OF ARGUMENT

This First Amendment case pivots on four points: 1) the right of citizens to engage in core political speech; 2) citizen participation in the political process; 3) differential treatment of citizens because of the content of their messages; and 4) the evidentiary burden that should be imposed on the government to prove that its interests in guarding against voter fraud and protecting the integrity of elections actually justify the censorship of speech of citizens peacefully seeking to obtain signatures from other citizens after they have voted.

Petitioners do not want to speak with citizens *before* they vote. Instead, they wish only to speak with citizens *after* they have voted in order to seek signatures on a petition to put an issue on the ballot. Florida Statutes Section 102.031(4)(a)-(b) (2008), however, prohibits them from engaging in such speech within 100 feet of the entrance to any polling place.

Yet a different category of speaker is treated in dramatically different fashion under this same section. In particular, all individuals conducting exit polls, regardless of whether they are members of the news media, are allowed to speak within the same zone to the very same citizens who just voted. There is no empirical data on the record in this case justifying this distinction. Specifically, there is no evidence demonstrating that the average citizen asking people for their signatures to have a petition placed on the ballot somehow interferes

with the voting process any more (if at all) than individuals conducting exit polls.

This disparate treatment of speakers directly conflicts with this Court's recent ruling in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), in which the majority opined:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *United States v. Playboy Entertainment Group, Inc.* (529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Id. at *19. The Court added that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Id.*

In addition, Respondents have failed to produce any studies or empirical data proving that

the speech activities of individuals who seek to collect signatures for political petitions from people who already have voted justify the 100-foot, no-approach zone imposed by the Florida statute at issue in this case.

Even in the area of commercial speech, which is only subject to intermediate scrutiny rather than the heightened strict scrutiny standard by which laws targeting political expression must be measured,[2] this Court has held that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-771 (1993). Justice Alito embraced this rigorous level of scrutiny in commercial speech cases while serving on the United States Court of Appeals for the Third Circuit in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).[3]

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[2] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (providing that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest").

[3] In declaring unconstitutional a Pennsylvania statute restricting advertisements for alcohol in college and university newspapers, then Judge Alito wrote for a unanimous three-judge panel that the Commonwealth of

(continued on the following page)

What is more, when it comes to restricting purportedly disruptive speech in public schools, this Court has held that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Under *Tinker*, there must be actual facts suggesting that a substantial or material harm will occur from a student's expression before it may be squelched. *See id.* at 514 ("the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

In summary, the Florida statute at issue restricts political expression, draws impermissible distinctions among citizens engaged in political expression, and is unsupported by evidence demonstrating a real harm from Petitioners' speech activities in post-voting situations that the statute will alleviate to a material degree. The Petition for Writ of Certiorari should be granted so that this Court can clarify the evidentiary standard of proof the State must satisfy in order to permissibly restrict political speech near polling places, and so that this Court can resolve whether distinctions

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Pennsylvania relied only on speculation and conjecture and had not offered any evidence to show the law would be effective. *Pitt News v. Pappert*, 379 F.3d 96, 107-08 (3d Cir. 2004).

between similarly situated speakers near polling places – exit pollsters and exit petitioners – are permissible under the First Amendment.

ARGUMENT

I. Causation of Harm: The Writ Should be Granted So That the Court May Clarify the Evidentiary Standard of Proof That a State Must Meet to Restrict Political Speech Near Polling Places

In delivering the opinion of the Court in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), Justice Scalia wrote that "[t]here are some propositions for which scant empirical evidence can be marshaled." *Id.* at 1813. That indeed may be true when it comes to the alleged effect of fleeting expletives on minors at issue in that case, but it certainly is not the case when it comes to harms allegedly caused by citizens seeking petition signatures after voters exit polling places.

Petitioners' Petition for Writ of Certiorari makes it clear that Petitioners presented the district court with "three different sets of statistical evidence, all of which were gathered during the period when Florida permitted petition circulation and other types of speech within the No Approach Zone." (Petition at 9.)[4] The data demonstrate a

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[4] The Petition for Writ of Certiorari in this case will be cited as (Petition at Pg#.). The Appendix for the Petition for Writ of Certiorari will be cited as (App. at Pg#.).

striking absence of any evidence of harm caused by petition circulation near polling places. (*Id.*)

Without evidence of any harm, this is a law in search of a problem. Respondents could have conducted their own studies and surveys focusing specifically on the differences between alleged disturbances (if any) caused by exit pollsters versus exit petitioners, but they apparently have not done so on the record of this case.

Proof that speech causes some harm must be demonstrated in nearly all areas of First Amendment jurisprudence, even those not demanding strict scrutiny. For instance, in the process of applying the lower standard of intermediate scrutiny to evaluate the constitutionality of government laws affecting the speech of cable system operators, this Court has held that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Even when it comes to regulating the speech of adult bookstores and sexually oriented businesses through zoning laws, government entities must put forth some evidence of harm. In particular:

> a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest [citation omitted]. This is not

> to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002).

Surely if speech-restricting regulations analyzed under the intermediate scrutiny standard and imposed upon the expression of large cable companies, commercial advertisers, and adult businesses must be justified by actual evidence showing real harms, then government entities seeking to regulate the speech of individual citizens who want to gather signatures in order to affect political and legal change must be required to show more proof than legislative reliance on history, conjecture and even common sense. As Justice Souter warned in *Alameda Books*, "we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics." *Id.* at 459 (Souter, J., dissenting).

In the instant matter, Petitioners actually have introduced statistics gathered from public data. (*See* Petition at 9 (stating that one set of data "contained a review of more than 5,000 complaints logged in the Election Incident Reporting System from Florida voters during the 2004 presidential election, none of which involved petition circulation, even though petition circulation was permitted near Florida polling

places at that time").) This would seem to constitute what Justice Stevens recently termed "a good empirical case for skepticism" about the necessity of a Florida law that limits political expression. *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856, at *87 (Jan. 21, 2010) (Stevens, J., dissenting).

The bottom line is this: the precise standard of evidence by which to measure the law at question in the instant case is unclear. The United States Court of Appeals for the Eleventh Circuit in this case even acknowledged that the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), is not controlling, writing that "[w]e accept that *Burson* does not bind us here; the material facts are different in some ways." (App. at 11a.)

In *Burson*, a plurality of the Court relied on evidence that was largely historical, writing that the "fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them." *Burson*, 504 U.S. at 208. The plurality added that "[e]lections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation." *Id.* at 209.

The Florida law at issue in this case, however, is of very recent vintage and there actually are specific findings of fact about what happened in its absence – namely, an utter absence of any complaints regarding petition circulation.

Despite this, the Eleventh Circuit relied largely on speculation and conjecture when it described the parade of horrors that might befall Florida voters if this law were not in place:

> [I]f exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And we accept it as probable that some – maybe many – voters faced with *running the gauntlet* will refrain from participating in the election process merely to avoid the resulting commotion when leaving the polls.

(App. at 14a-15a (emphasis in original).). While the Eleventh Circuit opinion includes a footnote providing that "the State produced evidence confirming that many Florida voters have complained that their entrance to and exit from the polls is like 'running the gauntlet' and have indicated that 'they will no longer participate in elections unless their access to the polls is better protected by the law,'" (*id.* at 15a n.14), even those voters who might possibly be deterred from showing up in person at a voting station still possess the often-used option of voting by absentee ballot, which is "fully accessible to all voters." *See* Fla. Stat. § 101.662 (2009). *See also* Fla. Stat.

§ 101.62 (2009) (describing the method for obtaining an absentee ballot). Much as consumers today shop online to avoid what they perceive as the hassle of long lines and extra time and effort to go to a store, voters who somehow fear going to and exiting the polls because they might be asked a question about their willingness to sign petitions after voting can easily cast a ballot from the privacy and seclusion of their own home.

The speech of Petitioners is political, not reprehensible. But even when the federal government sought to prohibit the reprehensible speech of virtual child pornography on the grounds that the speech arguably would lead to harm to minors at the hands of pedophiles, this Court struck down that effort, reasoning in part that "the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

The same reasoning has been applied to content-based laws designed to address the alleged harm to children caused by playing violent video games.

In particular, in its 2009 decision in *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit required California to offer "substantial evidence," *id.* at 962 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)), of the state's "purported interest

in preventing psychological or neurological harm," *id.* at 964, to minors who play violent video games. The Ninth Circuit not only engaged in its own examination and analysis of several studies offered by California, but it suggested that proof of harm causation – not merely correlation – was required:

> Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has.

Id. at 963-64.

Just one year earlier, the United States Court of Appeals for the Eighth Circuit in *Entertainment Software Association v. Swanson,* 519 F.3d 768 (8th Cir. 2008), went even further on the evidentiary burden in striking down a Minnesota law targeting violent video games when it held "that the evidence falls short of establishing

the statistical certainty of causation demanded." *Id.* at 772.

In the instant case, the speech in question is not low value speech like virtual child pornography or violent video games. Likewise, the target or victim of the speech is not children. Rather, the speech is political and the people who allegedly are harmed by it are adults. If proof of causation of harm is required to stop speech aimed at harming minors, then surely at least the same level of proof of causation of harm is required to prove that adults asking other adults if they want to sign a petition causes them harm.

Perhaps what Florida really is worried about is *conduct* – people pushing, touching, shoving, and otherwise physically interfering with citizens after they have voted and are exiting polling places. That, of course, can be restricted without raising First Amendment concerns and without stopping Petitioners from civilly asking a question about the willingness of an individual to sign a petition.

In summary, it is unclear what evidentiary standard must be imposed upon Florida to justify the law at issue. Even when the intermediate scrutiny standard is applied in areas such as commercial speech, government entities must prove that the alleged harms are real. For content-based laws like the one in this case, the burden should be higher and, in fact, federal courts have in some instances required government entities to show direct causation of harm through empirical data. Indeed, "in recent freedom of expression

cases, the [Supreme] Court is increasingly turning its attention to the quality and quantity of proof of the causal link between speech and harm." Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 Wm. & Mary Bill of Rts. J. 125, 197 (2004).[5] That trend should not be disrupted in this case.

Ultimately, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), this Court noted that "[t]he quantum of empirical evidence

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[5] After an extensive examination of this Court's First Amendment-based opinions, Huhn asserts that:

> Over the last decade there has emerged a simple and striking trend in the reasoning of the Supreme Court regarding freedom of expression. Instead of focusing on the right to freedom of expression, the Court is increasingly turning its attention to an analysis of the harm that may result from allowing the speech to remain unregulated. In place of analyzing what the law is, the Court is attempting to determine the facts that would justify regulation of speech. Rather than conducting a legal analysis, the Court is engaging in an empirical inquiry.

Id. at 194. *See also* Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 Pepp. L. Rev. 317, 359-60 (2009) (asserting that "the linkage requirements – the doctrinal rules that express the required connection between the potentially dangerous utterance and the ensuing harm – have tightened" in First Amendment jurisprudence during "the last several decades").

needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. Is it really plausible that the Petitioners who actually *want* people to sign their political petition will harass them? That surely would be an odd and counterintuitive way to get people to sign petitions. The much more plausible tactic, of course, would involve asking them politely to sign a petition. The Court should now grant the Petition for a Writ of Certiorari in order to define clearly the precise "quantum of empirical evidence" by which government entities must justify restrictions on citizens seeking to ask other citizens if they would be willing to sign a petition after leaving a polling place.

II. Disparate Treatment of Speakers: The Writ Should be Granted to Resolve Whether the Florida Statute Draws Impermissible Distinctions Between Similarly Situated Speakers

You can ask a person for whom they just voted, but you cannot ask a person for his or her signature on a petition.

That is what the disparate treatment of individual speakers enforced by Respondents boils down to under Florida Statutes Section 102.031(4)(a)-(b) (2008). It is disparate treatment based on the content of their political speech, and laws that discriminate against speakers based on the content of their messages are subject to strict

scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest"); *Sable Commc'ns Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

As this Court recently observed in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), there is a fundamental right of all citizens under the First Amendment to ask questions related to political matters. *See id.* at *18 (observing that "*the right of citizens to inquire*, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it") (emphasis added). Even more importantly, the Court explained that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others," reasoning that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at *19.

Significantly, this case involves the disparate treatment of speakers affecting the power of direct democratic speech of the average citizen, often as he or she attempts to counter more

financially endowed entities, like corporations. "[T]he Founding Fathers of the United States diverged from contemporary European models and focused on the power of the people." K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 824 (2006). This case, in a nutshell, revolves around the disparate treatment of the proverbial "little person" as he or she seeks to facilitate change through the collection of the signatures of registered voters in an economic and efficient manner at polling places.

This Court wrote nearly thirty years ago in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), that:

> the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort

> individuals can make their views known, when, individually, their voices would be faint or lost.

Id. at 294.

This statement captures the essence of what Petitioners in the instant case seek to do with their speech by gathering signatures in order to effectuate legal change. The Court should thus consider if there are any important differences that justify or support such disparate treatment by the State of Florida of individuals based upon the content of their speech and, specifically, the question or questions they seek to ask while standing in the same location.

As a starting point, one query – "For whom did you vote?" – is not any more intrusive than the other – "Would you be willing to sign a petition for X?" In fact, to the extent that the actual casting of a vote is a private activity, while the signing of a petition is a public statement of support or endorsement, those conducting exit polls would seem to ask the more personal questions. *See* Fla. Stat. § 101.71(1) (2009) (an "adequate provision shall be made for the privacy of the elector while casting his or her vote"). Indeed, this Court granted a petition for a writ of certiorari in January 2010 in *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) *cert. granted*, 78 U.S.L.W. 3295 (U.S. Jan. 15, 2010) (No. 09-559), to determine whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying

information about petition signers. The instant case provides a propitious and similar opportunity to clarify scrutiny and evidentiary standards regarding political petitions.

Second, it is far from clear that the question of the exit pollster is somehow more important or valuable to democracy than the question of the petition-signature collector. The speech of the exit pollster may allow predictions about the pending results of elections, but the speech of the petition-signature collector allows citizens to enact future legal changes and participate in the democratic process. As this Court has recognized, "the values in the right of petition as an important aspect of self-government are beyond question." *McDonald v. Smith*, 472 U.S. 479, 483 (1985).

Third, the citizen who has just exited a polling place after casting a vote is under no obligation or compulsion to speak to either exit pollsters or exit petitioners. He or she simply can keep on walking right past them both.

Related here is a fourth point – those leaving polling places are no longer in private places (voting booths) and they do not possess an expectation of privacy outside of the voting station that shields them from speech that they would rather not hear. If this Court protected the words "Fuck the Draft" inside the hallways of a public courthouse despite the fact that they might offend the sensibilities of some inside the building, then it seems logical to protect the speech, on a public sidewalk or driveway or parking lot outside of a

polling place, of a person who politely asks a question. *See Cohen v. California*, 403 U.S. 15, 21-22 (1971) (noting that "persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home").

Fifth, neither exit pollsters nor exit petitioners typically wield anything more menacing when conducting their speech-related activities than a clipboard, paper, identifying information or electronic data collector. Exit petitioners would not seem to be a particularly more intimidating or threatening presence than exit pollsters.

Ultimately then, all that Florida is left with in its effort to demonstrate a difference between the speakers – exit pollsters and exit petitioners – is a "gaping empirical hole." *Citizens United*, --- S. Ct. ---, 2010 WL 183856 at *56 (Stevens, J., dissenting). The only difference between the speakers is the content of their message, and as this Court has made clear, "[r]egulations which permit the Government to discriminate on the

basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

This Court recently reiterated the long-standing First Amendment principles that "speech is an essential mechanism of democracy" and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, --- S. Ct. ---, 2010 WL 183856, at *19. It is by design that Florida Statutes Section 102.031(4)(a)-(b) (2008) snuffs out the speech of individuals seeking signatures for petitions but not those claiming to conduct exit polls. One knows it was by design simply because, as Petitioners describe in their brief, the exemption allowing exit pollsters within the 100-foot, no approach zone was carved out by an amendment to the statute at issue in 2008. (Petition at 6-7.) Prior to that exemption, exit pollsters were subject to the same rules as exit petitioners under the Florida law adopted in 2005. *See* Fla. Stat. § 102.031(4)(a)-(b) (2006).

This move is especially odd because it comes when "[t]he use of direct democracy is at its highest level in more than one hundred years." Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 Vand. L. Rev. 395, 396 (2003).

Indeed, "[t]he tools of direct democracy – the initiative, the referendum, and the recall – developed as ways to amplify the voices of ordinary

people and to counter the influence of entrenched interests with clout to shape the traditional legislative process." Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1846 (1999).

The right to petition the government, as protected by the First Amendment, has a long history and should not be lightly treaded upon by the government:

> The principle that there is a fundamental right to petition government for redress of grievances has a long history. It was recognized in the Magna Carta in 1215, and in subsequent centuries its importance was repeatedly reaffirmed. The principle was transported to America, in part via charters for colonial government, where it became firmly embedded in the American political and legal system. Petitioning was a primary source of bills in pre-constitutional America.

Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. Colo. L. Rev. 129, 130 (1995).

Amici are aware of no similar historical and well-established tradition of exit polling dating back to the Magna Carta, yet Florida nonetheless privileges and protects it over the right of those

citizens collecting signatures for petitions to change the law.

CONCLUSION

For all of these reasons, which strike at the heart of political speech, democracy, the political process and the First Amendment rights of speech and petition, *amici curiae* respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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